UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MILTON DIAZ, Individually and on Behalf of All others Similarly Situated, Plaintiff, v. ELECTRONICS BOUTIQUE OF AMERICA INC. and ELECTRONICS BOUTIQUE HOLDING CORP., Defendants.	)	Civil Action No.: 04-CV-0840E(Sr)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 4

III. ARGUMENT 5

A. Standard of Review 5

B. Defendants' Motion Is Defective, Since Defendants Failed to Provide Notice to the Court of Their Constitutional Arguments Pursuant to Fed.R.Civ.P 24(c) and Local Rule 24 6

C. New York's Overtime Law Is Valid and Constitutional 8

1. New York State's Wage Laws Independently Provide Workers With The Right To Overtime Pay 8

2. The New York Legislature's Express Grant of Authority to the Commissioner to Create Overtime Regulations Was A Constitutional Delegation of Power 10

3. The Commissioner's Creation of New York's Overtime Regulation Was a Proper Exercise of Delegated Power 13

4. The Overtime Regulation Properly Incorporated Sections of the FLSA . 14

D. State Law Overtime Claims Neither Are Extinguished By The Rules Enabling Act Nor Preempted By Federal Law 18

1. The Rules Enabling Act Has No Impact on Plaintiff's State Law Class Claims 18

2. The FLSA does not preempt state law in the area of overtime compensation 22

3. The Court Should Exercise Supplemental Jurisdiction Over Plaintiff's State Law Overtime Claims 24

V. CONCLUSION 25

TABLE OF AUTHORITIES

FEDERAL CASES

Ansoumana v. Gristede's Operating Corp.,
201 F.R.D. 81 (S.D.N.Y. 2001) . . . . *passim*

Beltran-Benitez v. Sea Safari, Ltd.,
180 F. Supp. 2d 772 (E.D.N.C. 2001) 22

Brzychnalski v. Unesco, Inc.,
35 F. Supp. 2d 351 (S.D.N.Y. 1999) 19

Chan v. Triple 8 Palace,
2004 WL 1161299 (S.D.N.Y. May 24, 2004) 3, 18, 24

Conley v. Gibson,
355 U.S. 31 (1957) 6

Davis v. Lenox Hill Hosp.,
2004 WL 1926087 (S.D.N.Y. Aug. 31, 2004) 23

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 20

Goldman v. Radioshack Corp.,
2003 WL 21250571 (E.D. Pa. April 16, 2003) 24

Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo,
743 F. Supp. 977 (N.D.N.Y. 1990) 7

Kelley v. SBC, Inc., ,
1998 WL 928302 (N.D. Cal. Nov. 13, 1998) 21, 22

LaChapelle v. Owens-Illinois, Inc.,
513 F.2d 286 (5th Cir. 1975) 20, 23

Madrigal v. Green Giant Co.,
1981 WL 2331 (E.D. WASH. July 27, 1981) 23

Malinguez v. Joseph,
226 F. Supp. 2d 377 (E.D.N.Y. 2002) 2, 8, 23

McLaughlin v. Liberty Mutual Ins. Co.,
224 F.R.D. 304 (D. Mass. 2004) 21

Merrill v. Town of Addison,
763 F.2d 80 (2d Cir. 1985) 7

Noble v. 93 University Place Corp,
2004 WL 944543 (S.D.N.Y. May 3, 2004) 18, 19, 24

Overnite Transportation Co. v. Tianti,
926 F.2d 220 (2d Cir. 1991) 23

Prickett v. Dekalb Cty.,
349 F.3d 1294 (11th Cir. 2003) 20

Rochlin v. Cincinnati Ins. Co.,
2003 WL 21852341 (S.D. Ind. July 8, 2003) 23

Rodolico v. UNISYS Corp.,
199 F.R.D. 468 (E.D.N.Y. 2001) 24

Scott v. Aetna Services, Inc.
3:99CV (CFD), D. Conn. Sept. 13, 2001 21

Scott v. Aetna Services, Inc.,
210 F.R.D. 261 (D. Conn. 2002) 24

Smellie v. Mount Sinai Hospital,
2004 WL 2725124 (S.D.N.Y. Nov. 29, 2004) 18, 19, 22, 24

Statharos v. New York City Taxi and Limousine Commission,
198 F.3d 317 (2d Cir. 1999) 14

Strong v. Board of Educ. of the Uniondale Union Free School District,
902 F.2d 208 (2d Cir. 1990) 7

Swierkiewicz v Sormea, N.A.,
534 U.S. 506 (2002) 6

Tarshis v. Riese Organization,
211 F.3d 30 (2d Cir. 2000) 6

Velez v. Majik Cleaning Service, Inc.,
2005 WL 106895 (S.D.N.Y. Jan. 19, 2005) 8, 18, 24

Villager Pond, Inc. v. Town of Darien,
56 F.3d 375 (2d Cir. 1995) 6

STATE CASES

Ballard v. Community Home Care Referral Service, Inc.,
264 A.D.2d 747, 695 N.Y.S.2d 130 (2d Dep't 1999) 20

Board of Trustees of the Employees Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore City,
317 Md. 72 15

Boreali v. Axelrod,
71 N.Y.2d 1 (1987) 11, 13, 14

Carter v. Frito-Lay, Inc.,
74 A.D.2d 550 (1st Dep't 1980) 19

City of Amsterdam v. Helsby,
37 N.Y.2d 19 (1975) 12

Dote v. Dept. of Labor of State of New York,
18 N.Y.S.2d 557 (N.Y. Sup. Ct. 1940) 12

Matter of General Electric v. New York State Dept. of Labor,
551 N.Y.S.2d 966 (N.Y. App. Div. 1990) 13

Matter of Gerald Levine v. Whalen,
39 N.Y.2d 510 (1976) 10, 11

Lantry v. State of New York,
785 N.Y.S.2d 758 (N.Y. App. Div. 2004) 12

N.H. Lyons & Co., Inc. v. Corsi,
116 N.Y.S.2d 520 (N.Y. Sup. Ct. 1952) 12

People v. Mobil Oil Corp.,
422 N.Y.S.2d 589 (Nassau Cty. 1979) 15

Trustee of the Village of Saratoga Springs v. The Saratoga Gas, Electric Light and Power Co.,
191 N.Y. 123 (1908) 10

FEDERAL STATUTES

28 U.S.C. §2403(b) 7

29 U.S.C. §218(a) 22

FEDERAL RULES

Fed. R.Civ.P.24(c) 3, 5, 6, 7

L.R. 24 . . . . 3, 5, 6, 7

STATE CONSTITUTION

N.Y. Const. Art. IV §8 14

STATE STATUTES

N.Y. Executive Law §102 . . . . 145, 16

N.Y. Labor Law §21(11) 9, 11, 13, 16

N.Y. Labor Law §§ 653 . . . . 9, 13

N.Y. Labor Law §655(b) 9, 11, 13

N.Y. Labor Law §656 13

STATE REGULATIONS

12 NYCRR §§ 142-2.1 8

12 NYCRR §§ 142-2.2 . . . . *passim*

12 NYCRR §§ 142-2.6 8

12 NYCRR §§ 142-2.9 8

12 NYCRR §§ 142-2.14 8

12 NYCRR §§ 142-2.16 8

Plaintiff Milton Diaz ("Plaintiff"), on behalf of himself and all others similarly situated, through their undersigned counsel, respectfully submits this memorandum of law in opposition to the motion of Defendants Electronics Boutique of America and Electronics Boutique Holding Co. ("Defendants") to dismiss (the "Motion to Dismiss") the New York State ("State") law claims in Plaintiff's Class Complaint.

I. INTRODUCTION

In their overzealousness to remove their unlawful wage practices from this Court's scrutiny, Defendants make a rather remarkable claim: there is no New York State law requiring employers to pay their workers overtime. Defendants' specious claim is (1) unsupported by the plain language of the State's wage laws, (2) contrary to prevailing case law, and (3) improperly presented in this Motion to Dismiss. Furthermore, Defendants' claim is especially confounding here, as Defendants themselves – in public statements and in employee procedure manuals – have made and do make a particular point of claiming that they abide by ALL state wage laws, including, presumably, New York State wage laws.

Defendants should be estopped from conveniently denying the law's existence at this juncture, as (1) it is clear that Defendants in fact do recognize the validity of New York's overtime law (even if they nonetheless have failed to properly pay their New York employees owed overtime), and (2) Defendants have led their New York employees to believe that those employees are specifically protected under the State's overtime law.[1]

[1]As elucidated below, the federal and state wage laws provide separate protections and remedies. For example, claims for unpaid overtime under the New York State wage law have a six-year statute of limitations, rather than the maximum three-year statute of limitations governing Federal Labor Standards Act ("FLSA") claims. The State law also provides some

It would be manifestly unfair for the Court to permit Defendants both to publicly tout – when it suits them – the Company's adherence to the State's wage laws, and to now insist, in an improper effort to jettison Plaintiffs' claims from the courthouse, that the State's overtime law is constitutionally invalid.

"Wanting it both ways," however, is typical of Defendants in this litigation, and the arguments proffered in Defendants' Motion to Dismiss are simply the latest examples of this tack. For instance, Defendants argue that the State's Commissioner of Labor, in promulgating New York's overtime law, either has improperly taken the Legislature's power or improperly given up that power to Congress and the U.S. Secretary of Labor. See Defs.' Br. at pp. 3-8.

Moreover, Defendants, in their attempt to undermine the effective enforcement of wage laws' protections and force thousands of employees to pursue claims individually against a billion-dollar company, opposed certification of the FLSA collective action just one week before the instant motion was filed, yet now argue that the previously-opposed FLSA collective action is the only possible group remedy, as New York State law is invalid and preempted by the FLSA. Similarly, Defendants maintain that certification of Plaintiff's State law claims automatically converts a FLSA collective action into a Rule 23 proceeding, even though Plaintiff independently moved for both, and clearly identified the differing standards governing each.

As set forth below, these and Defendants' other arguments should fail, as not only is the State overtime law legally sound, but federal district courts in New York routinely have

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overtime benefits to employees who are exempt from such benefits under federal law. See, e.g, Malinguez v. Joseph, 226 F. Supp.2d 377, 389 (E.D.N.Y. 2002) ("New York law, unlike FLSA, awards reduced overtime compensation for domestic employees.").

permitted plaintiffs to assert their state claims for unpaid overtime in conjunction with plaintiffs' federal claims under the FLSA – especially where, as here, the federal and state claims are based on a common nucleus of operative facts. See, e.g., Chan v. Triple 8 Palace, 2004 WL 1161299 at *3 (S.D.N.Y. May 24, 2004); Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81, 89 - 93 (S.D.N.Y. 2001).[2] According to these courts, the assertion of supplemental jurisdiction in such circumstances is not just permissible, but preferred, as it advances the multiple goals of efficiency, convenience and fairness.[3] See, e.g., Chan, 2004 WL 1161299 at *3 ("Requiring separate federal and state cases to litigate these claims would be wasteful and foolish."); Ansoumana, 201 F.R.D. at 93 (exercising supplemental jurisdiction over Minimum Wage Act claims to avoid potentially exposing parties to inconsistent results).

Furthermore, and as discussed below, Defendants' charge of constitutional invalidity is an empty exercise (and therefore a complete waste of this Court's time), as this Court cannot invalidate the constitutionality of the state's overtime laws without first notifying the New York Attorney General of the constitutional challenge, thereby providing the Attorney General the opportunity to intervene. While Defendants have an independent obligation to provide separate notice to the Court of their constitutional challenge, (so that the Court, in turn, may properly notify the Attorney General), Defendants have not done so here. See Fed. R.Civ.P.24(c); L.R.24.

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[2] Here, Defendants effectively concede that Plaintiff's state and federal claims are virtually identical. See Defs.' Br. at 15.

[3] As shown infra, Defendants in their brief wholly ignore the recent and voluminous case history supporting the assertion of supplemental jurisdiction over state overtime claims brought in conjunction with claims for unpaid overtime brought under the FLSA. See infra at 18, 24.

It also is telling that Defendants' "unconstitutionality" arguments, spun from wishful thinking and thin as the air, were markedly missing from the Defendants' Answer to Plaintiff's Class Complaint (the "Answer"). See Affidavit of Judith Biltekoff ("Biltekoff Aff.") Exhibit 1. In fact, Defendants in their Answer (whose existence Defendants conveniently ignore) actually affirm the validity of the State's overtime law, by admitting, inter alia, that "Plaintiff Milton Diaz is a non-exempt employee under the FLSA and New York Labor Law ..." (emphasis added). See Answer at ¶14.

Non-issues at the time their Answer was filed, Defendants' unconstitutionality arguments are non-issues now, and serve only to underscore the obvious: Plaintiff has sufficiently pled his state cause of action in the Class Complaint, and as such, Defendants' Motion should be denied.

II. PROCEDURAL HISTORY

Plaintiff filed his Class Complaint on October 13, 2004, asserting Federal Fair Labor Standards Act claims and pendant New York State Labor Law Claims. On November 24, 2004, Plaintiffs Milton Diaz and Timothy Ostrander, respectively, filed a Notice of Consent to join the FLSA action and to serve as class and collective action representatives ("Representative Plaintiffs") on behalf of those similarly situated.

On November 17, 2004, Defendants answered the Complaint, asserting 18 affirmative defenses. The Answer neither challenged the validity of New York Labor Law nor raised any issues regarding supplemental jurisdiction.

On December 22, 2004, Representative Plaintiffs filed their motion to certify the FLSA collective action and send notice on a nationwide basis to all current and former store managers and assistant store managers. Defendants opposed sending such Notice, arguing that notification should not occur under the FLSA because none of Defendants' employees were similarly situated to Representative Plaintiffs.

In reply, Plaintiffs, inter alia, submitted Defendants' own job descriptions of manager and assistant manager used to recruit hirees, which demonstrated that, in Defendants' pre-litigation view, all of the store managers and assistant store managers were – not just similarly situated – but the same.[4] Oral argument was held on March 4, 2005 and the FLSA motion remains sub judice.

Thereafter, pursuant to a stipulation signed January 10, 2005, Plaintiffs were to file the motion for class certification of the New York State claims on March 16, 2005. On March 11, 2005, however, Defendants filed the instant motion to dismiss New York State claims.

Defendants now argue that the New York State labor laws are unconstitutional, violate the Rules Enabling Act, and are preempted by federal law. (As noted above, none of these specious arguments were raised in Defendants' Answer.) Furthermore, as discussed infra, Defendants never filed with the Court the notice required by to Fed.R.Civ.P. 24(c) and L.R.Civ.P. 24, certifying the constitutional claims and providing notice to the New York State Attorney General. See discussion infra at 6 - 8.

III. ARGUMENT

A. Standard of Review

A Court considering a motion to dismiss "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." Tarshis v. Riese Organization, 211 F.3d 30, 35 (2d Cir. 2000). A motion to dismiss must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 31, 45-46 (1957). See also Swierkiewicz v Sormea, N.A., 534 U.S. 506, 514 (2002) ("[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." (internal quotes omitted). The review of such a motion is limited, and "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

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[4]While Plaintiffs through this action seek recompense for years of illegal wage practices, Defendants have been profiting by those practices, and on April 18, 2005, Defendants announced that they were being purchased by Gamestop, a deal that will provide Defendants' executives with hundreds of millions of dollars.

As demonstrated below, Defendants' motion fails to meet the standard to dismiss and therefore should be denied.

B. Defendants' Motion Is Defective, Since Defendants Failed to Provide Notice to the Court of Their Constitutional Arguments Pursuant to Fed.R.Civ.P 24(c) and Local Rule 24

As an initial matter, Defendants' Motion is defective, since Defendants did not properly notify the Court of their purported constitutional challenge. Although it is ultimately the Court's duty to notify the Attorney General of such a challenge, the party challenging the constitutionality of the state statute "shall forthwith and in writing notify the Court of the existence of such question and specifically identify the statute and the respects to which it is claimed to be unconstitutional." L. R. 24. See also Fed.R.Civ.P. 24(c) (stating that "a party challenging the constitutionality of legislation should call the attention of the court to its consequential duty.")[5] As Defendants have failed to properly notify this Court of their constitutional challenge, the New York Attorney General has not been provided the necessary opportunity to intervene and defend the State regulation's constitutionality, as required by federal law. See 28 U.S.C. §2403(b).[6]

The requirement that the Attorney General be given this opportunity to defend the constitutionality of a State law is rooted in common sense, and failure to comply with the requirement has real-world consequences. Here, for instance, Defendants have asserted, incorrectly, that the State's overtime law is unconstitutional because the FLSA was not filed with the Secretary of State until some 14 years after its enactment. See Defs.' Br. at 8, n.4. In actuality, the FLSA was filed by December 16, 1986 (taking a fair amount of steam out of Defendants' unconstitutionality argument). See Biltekoff Aff. Ex. 3. Had Defendants followed the notification procedure proscribed by Rule 24(c) and L.R. 24, they presumably would have learned from the Attorney General the true FLSA filing date, and saved the Court and the parties unnecessary motion practice.

Even absent the participation of the Attorney General, the Court can and should uphold the validity of the State's overtime provision, since, as demonstrated below, New York's overtime law is constitutionally sound.

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[5] Moreover, the Federal Procedure Forms database provides parties with a notice form to be filed with the Court. See 1 Fed. Proc. Forms §1:604, Biltekoff Aff. Ex. 2.

[6] That rule requires that in any federal lawsuit to which a State (or any agency of the State) is not a party and where the constitutionality of a state law is challenged, "the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence...and for argument on the question of constitutionality." 29 U.S.C. §2403(b). See Strong v. Board of Educ. of the Uniondale Union Free School District, 902 F.2d 208, 213 n.3 (2d Cir. 1990); Merrill v. Town of Addison, 763 F.2d 80, 82-83 (2d Cir. 1985); Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo, 743 F. Supp. 977, 1005 (N.D.N.Y. 1990).

C. New York's Overtime Law Is Valid and Constitutional

1. New York State's Wage Laws Independently Provide Workers With The Right To Overtime Pay

Even without reference to the FLSA, New York wage laws require employers to pay their employees "overtime at a wage rate of one and one-half times the employee's regular rate ...." for any hours in excess of 40 weekly (for non-residential employees), and include, inter alia, a specific definition of "employee"; an explanatory list of the occupations that the State considers exempt from the overtime pay requirement; minimum wage requirements; requirements that minimum and overtime wage payments be paid based on each week of work; information regarding an employee's "regular rate"; and the detailed records keeping requirement for all New York State employers. See 12 NYCRR §§ 142-2.2; 142-2.14; 142-2.1; 142-2.9; 142-2.16; 142-2.6. See Biltekoff Aff. Ex. 4. See also Malinguez v. Joseph, 226 F. Supp.2d 377, 389 (E.D.N.Y. 2002) ("New York law, unlike FLSA, awards reduced overtime compensation for domestic employees."); Velez v. Majik Cleaning Service, Inc., 2005 WL 106895 (S.D.N.Y. Jan. 19, 2005) (setting out separate overtime provisions of federal and State wage law). Thus, while New York may reference the FLSA, the obligation to pay overtime is an independent requirement under the State's wage law.

Defendants, however, in their scattershot attack on the validity of the New York's overtime law, treat the State's independent overtime law as so much gossamer, preferring – understandably – to distract the Court's attention with unfounded allegations regarding the Labor

Commissioner's proper authority and improprieties in certain regulatory filing requirements. See Defs.' Br. at 3-8. Even in these largely irrelevant arguments, however, Defendants come up empty-handed.

First, the New York Legislature has expressly delegated authority to the State's Labor Commissioner to establish overtime law regulations. See N.Y. Labor Law §21(11). There, the Legislature bestowed upon the Commissioner the broad power to "issue such regulations governing any provision of this chapter as he finds necessary and proper." Furthermore, under the Minimum Wage Act, N.Y. Labor Law §650 *et seq.*, the Legislature specifically granted to the Commissioner the power to appoint a "wage board" to investigate, report and recommend adequate minimum wages and regulations - including overtime regulations - to provide adequate maintenance and to protect the health of employees within the State.[7] N.Y. Labor Law §653(1). Pursuant to the Legislature's instructions to safeguard New York's minimum wages, the wage board recommended and the Commissioner adopted New York's overtime law, 12 NYCRR §142-2.2**,** which requires that "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate." This overtime regulation is both constitutional and valid, as: (1) the New York legislature's express grant of authority to the

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[7]Under N.Y. Labor Law §655(b):

> In addition to recommendations for minimum wages, the wage board may recommend such regulations as it deems appropriate to carry out the purposes of this article and to safeguard minimum wages...Such recommended regulations may also include...overtime or part-time rates....

N.Y. Labor Law §656 further authorizes the Commissioner, by order, to accept, modify or reject the wage board's report, with the regulations becoming effective thirty days after the Commissioner's order.

Commissioner to create overtime regulations was a constitutional delegation of power; and (2) the Commissioner's creation of these overtime regulations was a proper exercise of that delegated power .

2. The New York Legislature's Express Grant of Authority to the Commissioner to Create Overtime Regulations Was A Constitutional Delegation of Power

It is uncontroverted that "'Congress may certainly delegate to others powers which the legislature may rightfully exercise itself.'" Trustee of the Village of Saratoga Springs v. The Saratoga Gas, Electric Light and Power Co., 191 N.Y. 123, 133-134 (1908) (quoting Chief Justice Marshall in Wayman v. Southard, 23 U.S. 1, 43 (1825)). See also Matter of Gerald Levine v. Whalen, 39 N.Y.2d 510, 515 (1976) ("there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature").

New York – recognizing that the executive branch plays a crucial role in the administration of the laws – takes a flexible approach to the delegation of legislative power. As the New York Court of Appeals stated in Bourquin v. Cuomo:

> Despite this functional separation [between the legislative and the administrative], this Court has always understood that the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets.
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> * * *
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> [T]his Court's long-standing and steadfast refusal to construe the separation of powers doctrine in a vacuum, instead viewing the doctrine from a commonsense perspective. As Chief Judge Cardozo explained more than a half-century ago: "[t]he exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of separation of powers."

Id. 85 N.Y.2d 781, 784-85 (1995)(quoting Matter of Richardson, 247 N.Y. 401, 410 (1928)).[8]

The legislature, to meet these lenient constitutional requirements, need only provide broad, general standards to guide the executive in the administration of the laws. As the New York Court of Appeals has indicated:

> The standards or guides need only be prescribed in so detailed a fashion as is reasonably practicable in the light of the complexities of the particular area to be regulated, since necessity fixes a point beyond which it is unreasonable and impracticable to compel the Legislature to prescribe detailed rules. * * * Indeed, in many cases, the Legislature has no alternative but to enact statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details.

Matter of Levine, 39 N.Y.2d at 515 (internal citations omitted).

Here, the enabling legislation easily satisfies the constitutional requirements. N.Y. Labor Law §655(b) contains adequate standards: "the wage board may recommend such regulations as it deems appropriate to carry out the purposes of this article and to safeguard minimum wages..." See Matter of Levine, 39 N.Y.2d at 517 (holding that "'to provide for the protection and promotion of the health and inhabitants of the state' is sufficiently specific and clear when viewed in the light of other statutory standards which have been upheld") (collecting cases).

In addition, New York's Minimum Wage Act, of which §655(b) is a part, contains a specific "statement of public policy" in §650 to guide the wage board and the Commissioner in regulating overtime benefits:

There are persons employed in some occupations in the state of New York at

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[8] See also Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987) ("Derived from the separation of powers doctrine, the principle that the legislative branch may not delegate all of its law-making powers to the executive branch has been applied with the utmost reluctance - - even in the early case law").

> wages insufficient to provide adequate maintenance for themselves and their families. Such employment impairs the health, efficiency, and well-being of the persons so employed, constitutes unfair competition against other employers and their employees, threatens the stability of industry, reduces the purchasing power of employees, and requires, in many instances, that wages be supplemented by the payment of public moneys for relief or other public and private assistance. Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of this state and injures the overall economy.
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> Accordingly, it is the declared policy of the state of New York that such conditions be eliminated as rapidly as practicable without substantially curtailing opportunities for employment or earning power. To this end minimum wage standards shall be established and maintained.

Constitutional challenges to similar labor regulations routinely have been defeated. As the New York Court of Appeals held in City of Amsterdam v. Helsby, 37 N.Y.2d 19 (1975):

> Here, the Legislature has delegated to PERB [Public Employees Relations Board], and through PERB to Ad hoc arbitration panels, its constitutional authority to regulate the hours of work, compensation, and so on, for policemen and firemen...We conclude that the delegation here is both proper and reasonable.

See also N.H. Lyons & Co., Inc. v. Corsi, 116 N.Y.S.2d 520 (N.Y. Sup. Ct. 1952) (State Industrial Commissioner did not exceed his authority by fixing minimum wage standards in the hotel industry); Dote v. Dept. of Labor of State of New York, 18 N.Y.S.2d 557 (N.Y. Sup. Ct. 1940) (New York labor statute giving Industrial Commissioner the power to regulate which industries could allow industrial homework was not an unconstitutional delegation of power to the executive); cf. Lantry v. State of New York, 785 N.Y.S.2d 758 (N.Y. App. Div. 2004) (Department of Labor's use of collective bargaining agreements to set prevailing wage rates was not an unconstitutional delegation of power); Matter of General Electric v. New York State Dept. of Labor, 551 N.Y.S.2d 966 (N.Y. App. Div. 1990) (same).

Although Defendants repeatedly cite Boreali v. Axelrod, 71 N.Y.2d 1 (1987), Boreali actually supports Plaintiff's arguments that a broad delegation of power can be constitutional. In Boreali, the Public Health Council, acting pursuant to §225(5)(a) of the Public Health Law authorizing the PHC to "deal with any matters affecting the...public health," enacted a comprehensive code that governed smoking in public areas. At issue was: (1) whether the legislature's broad grant of authority to the PHC was an unconstitutional delegation of power; and (2) whether the agency exceeded its grant of authority in enacting the smoking regulations. Boreali, 71 N.Y.2d at 9. The court held that the broad enabling statute, arguably broader than the one at issue here, was a constitutional delegation of authority. Id. On the second question, however, the court held that the agency exceeded its delegated power because "the PHC wrote on a clean slate" - the agency was not granted the authority to develop smoking regulations. Here, as discussed below, and unlike Boreali, the Commissioner was granted the express authority to create overtime regulations.

3. The Commissioner's Creation of New York's Overtime Regulation Was a Proper Exercise of Delegated Power

As shown above, the Commissioner implemented New York's overtime regulation, 12 NYCRR §142-2.2, under the authority of N.Y. Labor Law **§§** 653(1), 655(b) and 656, which expressly granted to the Commissioner the power to adopt overtime regulations in order to carry out the purposes of the Minimum Wage Act and to protect minimum wages. See, e.g., N.Y. Labor Law §653(b) (authorizing the adoption of overtime regulations "to carry out the purposes of [the Minimum Wage Act] and to safeguard minimum wages").

The Second Circuit decision in Statharos v. New York City Taxi and Limousine Commission, 198 F.3d 317 (2d Cir. 1999), is instructive. In Statharos, taxi medallion owners sought a preliminary injunction barring enforcement of a financial disclosure rule promulgated by the New York City Taxi and Limousine Commission. The medallion owners argued that the Commission lacked authority to issue the rule. Looking to New York State law, the Second Circuit noted that the New York Appellate Division had previously determined that the Commission was within its authority in issuing the regulation:

> In contrast to the 'blank slate" of Boreali, the enabling legislation before us specifically grants the Commission the power to issue regulations to insure the financial responsibility of medallion owners. The regulations in the instant case aim to do just that...The Commission has not abrogated the legislature's power to act in furtherance of broad social or economic goals outside the Commission's mandate, and therefore has not improperly exercised its power to engage in interstitial rulemaking within the meaning of Boreali.

Statharos, 198 F.3d at 322 (emphasis added). See also Bourquin, 85 N.Y.2d at 785 (it is "only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation of powers is violated").

Here, as in Statharos and Bourquin, because the State's over time regulation fits within the express mandate given to the Commissioner by the Legislature, the Commissioner's creation of 12 NYCRR §142-2.2 was a proper exercise of power.

4. The Overtime Regulation Properly Incorporated Sections of the FLSA

Contrary to Defendants' claim, the Commissioner did not improperly cede rulemaking authority to the federal government by incorporating federal law by reference into the State's overtime regulations. A New York State agency may incorporate by reference in its regulations Federal statutes and regulations, see 1980 N.Y. Opp. Atty. Gen. 47, provided the agency satisfies the requirements of N.Y. Executive Law §102 and N.Y. Const. Art. IV §8. Under these provisions, an agency regulation properly incorporates federal law if the federal law is identified in the text of the regulation, and the referenced federal law is filed with the New York Department of State. See "Rule Making in New York, Chapter 5: Incorporation by Reference" available at http://www.dos.state.ny.us/info/RuleMakingManual.htm, last visited May 22, 2005. New York's overtime regulation easily satisfies these requirements.[9]

First, the overtime regulation satisfies the Executive Law §102(c) requirement that any federal statute or regulation incorporated into an agency regulation must be clearly identified in the text. In addition to identifying the relevant incorporated sections of the FLSA and the date of the statute, 12 NYCRR §142-2.2 expressly states:

> The Fair Labor Standards Act is published in the United States Code, the official compilation of Federal statutes, by the Government Printing Office, Washington, D.C. Copies of the Fair Labor Standards Act are available at the following office:
>
> New York State Department of Labor
Counsel's Office
State Office Building Campus
Building 12, Room 509

[9] In addition, the case Defendants rely on here, People v. Mobil Oil Corp., 422 N.Y.S.2d 589 (Nassau Cty. 1979) is inapposite, as it concerns the incorporation of a private association's rules and standards - not the incorporation of federal regulations, which is expressly permitted in New York. See also Board of Trustees of the Employees Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore City, 317 Md. 72, 95, 95 n.24 (Although "[c]ourts have frequently viewed the legislative incorporation of future changes or revisions in a standard promulgated by a private entity as an impermissible delegation of authority...The principle set forth in these cases does not apply to a delegation of a legislative power to a *governmental* entity. In our complex system of government, state and local as well as state and federal authority unavoidably intermesh. As a result, a legislature may ordinarily adopt a standard promulgated by another governmental entity, even if that standard is subject to modification by the other governmental entity.") (emphasis in original, internal citations omitted).

Albany, NY 12240-0005

Second, in satisfaction of the filing requirement and contrary to the contention in the Affidavit of Defendants' Counsel Adam Price (filed with Defendants' Memorandum of Law in Support of its Motion to Dismiss), the Commissioner filed the FLSA with the Department of State on December 16, 1986. See Biltekoff Aff. Ex. 3. Thus, the Commissioner has fully satisfied its obligations regarding the incorporation of the FLSA - - obligations which, in the judgment of the New York Legislature, are sufficient to protect New York's autonomy and give notice to its citizenry.[10]

Furthermore, Defendants' arguments concerning the automatic adoption of amendments to incorporated federal statutes and regulations are directly contrary to N.Y. Executive Law §102(d) and the rulemaking procedure established by the State Administrative Procedure Act ("SAPA"). Under Executive Law §102(d), "[n]o amendment to any [incorporated federal law] shall be effective unless adopted in compliance with the applicable provisions of law and filed with the secretary of state pursuant to this section." As such, no amendment to the FLSA becomes the law of New York unless it is expressly adopted according to established rulemaking procedure and filed with the Secretary of State.[11] Thus, the recent amendments to the FLSA -

[10] Even, assuming arguendo, that some part of the State's overtime regulation was found unconstitutional, the remainder of the regulation would still be valid under the wage law's "savings clause." See N.Y. Labor Law §665 ("If any provision of [Article 19, the Minimum Wage Act] or the application thereof to any person, employer, occupation or circumstance is held invalid, the remainder of the article and the application of such provision to other persons, employees, occupations, or circumstances shall not be affected thereby."). See Biltekoff Ex. 5.

[11] SAPA §202, which governs agency rulemaking, requires that before the adoption of any rule (including any revised or amended rule), the agency must, among other things, publish a Notice of Proposed Rulemaking in the New York State Register and give the public the

like any other amendment to a federal statute incorporated within a New York regulation - cannot become the law of New York unless New York citizens are given notice and the opportunity to voice their opinions and objections to the proposed changes.

In fact, these controversial amendments to the overtime exemptions have not been adopted by New York State. As of this writing, the Department of Labor has not filed a Notice of Proposed Rulemaking in the New York State Register in connection with the adoption of the recent federal amendments to the FLSA. Thus, the Department of Labor has not even proposed that the State adopt the recent federal amendments. See also Loren Gesinksy & Douglas E. Arone, "Changes on Overtime: FLSA Regulations have Ripple Effect on State Laws" New York Law Journal, Dec. 20, 2004 (citing an internal memorandum issued by the New York Commissioner of Labor on August 22, 2004 "expressly instructing that the overtime standards under New York law would remain exactly as they were immediately before the updated FLSA regulations became effective").

Defendants' entire "automatic adoption" argument apparently is manufactured whole-cloth from Defendants' incorrect reading of § 142-2.2, which refers to "the Fair Labor Standards Act of 1938, as amended....". From this language, Defendants somehow how inferred that the regulation authorizes the automatic adoption of any prospective amendments to the FLSA. The

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opportunity to comment on the proposal in public hearings. SAPA §202(1). See also "Rule Making in New York, Chapter 5: How to Incorporate by Reference," supra, ("When the outside previously incorporated by reference materials are amended, and the agency wishes to incorporate the amendments in NYCRR, it must commence a Notice of Proposed Rulemaking to incorporate the changes.").

regulation authorizes nothing of the sort and the "as amended" reference simply refers to the official title of the publication of the FLSA that was filed with the Secretary of State. See Biltekoff Aff. Ex. 3.

D. State Law Overtime Claims Neither Are Extinguished By The Rules Enabling Act Nor Preempted By Federal Law

Nothing in the Rules Enabling Act or the preemption doctrine warrants dismissal of Plaintiff's State law claims – the fatal flaw in Defendants' arguments to the contrary is Defendants' failure to recognize that Plaintiff possesses two separate causes of action:

1) a collective action under §216 of the FLSA; and

2) a separate state law class claim over which the Court may, and should, exercise supplemental jurisdiction.

In fact, the only real question is whether this Court will exercise supplemental jurisdiction over Plaintiff's State law claims. As demonstrated below, it is not only proper, but preferred, that courts exercise supplemental jurisdiction where as here, the federal and state claims in question form "a common nucleus of operative fact," such that judicial economy weighs in favor of hearing the state and federal claims at the same time. See Chan, 2004 WL 1161299 at *3; Ansoumana, 201 F.R.D. at 89-93. As demonstrated below, it therefore is unsurprising that federal courts in New York routinely exercise supplemental jurisdiction over plaintiffs' state law labor claims. See, e.g. Velez v. Majik Cleaning Service, Inc., 2005 WL 106895 (S.D.N.Y. Jan. 19, 2005); Smellie v. Mount Sinai Hospital, 2004 WL 2725124 *7 (S.D.N.Y. Nov. 29, 2004); Noble v. 93 University Place Corp., 2004 WL 944543 (S.D.N.Y. May 3, 2004).

1. The Rules Enabling Act Has No Impact on Plaintiff's State Law Class Claims

As an initial matter, it is ironic that Defendants, in their efforts to extinguish Plaintiff's State law class claims, invoke the Rules Enabling Act ("REA") - a statute designed to protect, not destroy, substantive claims. More to the point, and as well supported in the case law, Plaintiff's State law class claims do not violate the REA, as such claims may lawfully be pursued under both CPLR §901(b) and FLSA §216(b); the REA therefore presents no bar to the Court's exercising supplemental jurisdiction over Plaintiffs' State law class claims here.

As explained below, and contrary to Defendants' claims, permitting Plaintiffs to pursue together both their FLSA claims and a state class action neither (1) improperly suffuses § 901(b) with substantive rights, nor (2) violates any rights conferred by § 216(b).

Defendants nonetheless claim that a class action under the State's overtime law – which offers a successful plaintiff the possibility of liquidated damages – violates § 901(b), which prohibits – unless expressly stated otherwise – a class action proceeding when damages include a penalty or a minimum measure of recovery. Courts, however, have given short shrift to such an argument, finding that § 901(b) poses no bar to class certification, and that potential class members may waive their State liquidated damages by remaining in the class, or may opt-out and pursue their State claims for liquidated damages on an individual basis. See, e.g., Brzychnalski v. Unesco, Inc., 35 F. Supp.2d 351, 353 (S.D.N.Y. 1999); Ansoumana, 201 F.R.D. at 88; Noble, 224 F.R.D. at 341; see also Smellie, 2004 WL 2725124 at *5 (citing Pesantez v. Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659 (1st Dept. 1998)).[12] Thus, the weight of authority

[12] In contrast, the cases cited by Defendants to support their arguments to the contrary are irrelevant, as they (1) largely limit their holdings to the simple rejection (without any relevant analysis) of class certification for state claims with liquidated or punitive damages, or (2) do not involve concomitant FLSA wage claims. See, e.g., Carter v. Frito-Lay, Inc., 74 A.D.2d 550 (1st

falls in allowing an action to proceed as a class and permit plaintiffs to either remain in the class and waive state liquidated damages, or opt out to individually pursue state liquidated damages.

Furthermore, the Court's addressing the state class action and the FLSA collective action in one litigation in no way would alter the rights of the parties in the federal opt-in action. Plaintiffs, on a nationwide basis, still must opt in to become a part of the FLSA collective action (and avail themselves of the remedies it affords); and Defendants still would be obliged to litigate, and be bound by a judgment on, only the federal claims of plaintiffs who had done so. In contrast, employees in New York may avail themselves of the additional protections provided under State law, including a six year statute of limitations and the right to pursue their claims for unpaid overtime and wages as a class action, but only by waiving their right to liquidated damages.[13]

Tellingly, in arguing that Rule 23 is inapplicable to actions under the FLSA because Rule 23 contains opt-out provisions while the FLSA specifies an opt-in procedure, Defendants repeatedly cite cases involving only federal - and not state - claims. See, e.g., LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975); Prickett v. Dekalb Cty., 349 F.3d 1294 (11th Cir. 2003). Where, as here and as distinct from LaChapelle and Prickett, federal and state claims are involved, courts have rejected such tactics, stating, for instance:

Dep't 1980); Ballard v. Community Home Care Referral Service, Inc., 264 A.D.2d 747, 695 N.Y.S. 2d 130 (2d Dep't 1999).

[13] Furthermore, under Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), if the Court opts to exercise supplemental jurisdiction over the state law claim, the Court must apply state substantive law and federal procedural law - - here, Fed. R. Civ. P. 23, the federal procedural rule applicable to class actions.

> These cases do not address the question currently before the Court, however, because each involved only FLSA or [federal] ADEA claims. In contrast, Plaintiffs in this case assert both FLSA and pendant State law claims. The opt-in provisions of the FLSA do not act as a complete bar to class certification under Rule 23 where pendant State law claims are involved.

Kelley v. SBC, Inc., 1998 WL 928302 (N.D. Cal. Nov. 13, 1998). See also Scott v. Aetna Services, Inc., 3:99CV46 (CFD), D. Conn. Sept. 13, 2001.[14]

Defendants should not succeed in their efforts to conflate Plaintiff's federal and state claims, and the two, distinct procedural mechanisms by which those claims will be litigated. As the Court wrote in McLaughlin v. Liberty Mutual Ins. Co., 224 F.R.D. 304, 307-308 (D. Mass. 2004):

> As other courts have noted, the FLSA action and state law remedies are entirely separate rights that may be pursued by plaintiffs. Thus, an employee's failure to opt in to the FLSA litigation should not deprive them of their right to pursue a state law remedy through a single class action. By enacting an opt-in regime for the FLSA, Congress sought to limit the scope of collective actions under federal law. I should not, however, infer from that restriction on *federal* remedies a concomitant restriction on *state* remedies. Nothing in the statute limits available remedies under state law. Nor should I infer from an employee's election not to pursue a federal remedy a forfeiture of that employee's right to pursue a state remedy. Requiring the employees who have not opted in to the FLSA claim to pursue duplicative litigation in state court would be a waste of judicial resources

[14] In Scott, the Court flatly rejected arguments similar to those posed by Defendants here. In that case, the defendants sought to limit the court's exercise of supplemental jurisdiction over state labor law claims to those plaintiffs that opted in to FLSA action. The defendants argued that the limit was necessary in order to prevent an "end run" around the opt-in requirement of the FLSA and to prevent plaintiffs from "bootstrapping" federal jurisdiction over their Rule 23 class. Id. at *3. The District of Connecticut, however, rejected this argument, holding that it would exercise supplemental jurisdiction over the entire Rule 23 class because litigating two separate actions in federal and state court created a risk of inconsistent decisions and the "potential for greater cost, inefficiency, and general confusion of issues. Id. at *6 (citing Ansoumana, 201 F.R.D. at 96). This decision is attached for the Court's convenience at Biltekoff Aff. Ex. 6.

> and would increase litigation costs for the parties, perhaps prohibitively so for the remaining putative class members.

See also Beltran-Benitez v. Sea Safari, Ltd., 180 F. Supp.2d 772, 774 (E.D.N.C. 2001) (rejecting defendant's argument that state labor law claims should be dismissed because they are "irreconcilable" with Section 216 of FLSA because the "FLSA's prohibition of Rule 23 class actions does not bar the application of Rule 23 to a separate cause of action in the same complaint"); Kelley, 1998 WL 928302 (N.D. Cal. Nov. 13, 1998) (holding "the opt-in provision of the FLSA is not a bar to class certification of Plaintiffs' pendant State law claims under Rule 23").

In sum, Defendants' concerns about their own rights, as well their purported concern about the rights of absent class members, will be adequately addressed by the Court in its application of the procedural safeguards of Rule 23. See Smellie, 2004 WL 2725124 *7 (certifying state law overtime claims under Rule 23(b)(3) in an opt-in FSLA collective action since "class members can be afforded effective notice that will appropriately protect their rights and make clear their opportunities in connection with this litigation").

2. The FLSA does not preempt state law in the area of overtime compensation

The FLSA does not preempt state law overtime regulation - either expressly, impliedly, or by any other way Defendants may attempt to manufacture. In fact, §218(a) of the FLSA expressly provides that the states can create and implement their own labor laws:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum work week established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal

> ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

29 U.S.C. §218(a). See also Overnite Transportation Co. v. Tianti, 926 F.2d 220, 222 (2d Cir. 1991) ("Congress' intent to allow state regulation to coexist with the federal scheme can be found in §18(a) of the FLSA, which explicitly permits states to mandate greater overtime benefits."); Davis v. Lenox Hill Hosp., 2004 WL 1926087 at *7 (S.D.N.Y. Aug. 31, 2004); Manliguez, 226 F.Supp.2d at 388-389. Congress' express mandate that states regulate employment issues and the courts' clear acceptance of that mandate effectively dismantles Defendants' preemption argument.

It is therefore unsurprising that Defendants, in their attempt to convince the Court that the FLSA preempts state law overtime claims, resort to misleadingly citing the holdings of several cases including La Chapelle, 513 F.2d at 288, Madrigal v. Green Giant Co., 1981 WL 2331 at *3 (E.D. Wash. July 27, 1981); and Rochlin v. Cincinnati Ins. Co., 2003 WL 21852341 (S.D. Ind. July 8, 2003). Once again, Defendants attempt to muddy the issues by conflating Plaintiff's state and federal claims, hoping to create a conflict where none exists. For instance, LaChapelle and Rochlin simply stand for the proposition, uncontested here, that the Rule 23 standards are inapplicable to claims under Section 216(b). In addition, the dismissal of the state law claims in Madrigal was premised on the court's conclusion that plaintiff's success on its state claims was "wholly dependent upon the showing of a FLSA violation." Madrigal, 1981 WL 2331 at *3. Here, as Defendants repeatedly and conveniently ignore, Plaintiff's state law claims are distinct and independent of Plaintiff's claims under the FLSA. Thus, as Congress expressly provided, Plaintiff's state law overtime claims are not preempted here.

3. The Court Should Exercise Supplemental Jurisdiction Over Plaintiff's State Law Overtime Claims

As stated above, the Court's exercise of supplemental jurisdiction is proper where, as here, the claims form "a common nucleus of operative fact" and judicial economy weighs in favor of hearing the state and federal claims at the same time. Ansoumana, 201 F.R.D. at 89-90. As such, and as Defendants conveniently ignore, courts routinely exercise supplemental jurisdiction over state law class claims brought under Rule 23 in conjunction with federal opt-in claims under the FLSA. See Smellie, 2004 WL 2725124 *7 (certifying state law overtime claims under Rule 23(b)(3) in an opt-in FSLA collective action since "class members can be afforded effective notice that will appropriately protect their rights and make clear their opportunities in connection with this litigation"); Chan, 2004 WL 1161299 (exercising supplemental jurisdiction over plaintiff's New York State labor claims since "[r]equiring separate federal and state cases to litigate these claims would be wasteful and foolish"); Goldman v. Radioshack Corp., 2003 WL 21250571, *4 (E.D. Pa. April 16, 2003) ("District Courts routinely exercise supplemental jurisdiction over related state labor law claims when the original jurisdiction is founded on 28 U.S.C. §1331 and the plaintiffs are bringing an FLSA representative action...The clear weight of authority is in favor of exercising supplemental jurisdiction.") (citations omitted); see also Chavez, 2002 WL 31662302; Velez, 2005 WL 106895; Noble, 2004 WL 944543; Scott v. Aetna Services, Inc., 210 F.R.D. 261 (D. Conn. 2002); cf. Rodolico v. UNISYS Corp., 199 F.R.D. 468 (E.D.N.Y. 2001) (certifying New York Human Rights Law claims under Rule 23 and allowing

Age Discrimination in Employment Act (ADEA) claims to proceed as a collective action).

In sum, the Court's exercise of Plaintiff's State law class claims not only fully protects all of the parties' various substantive and procedural rights, but also provides the ideal mechanism to deal efficiently with Plaintiff's claims.

V. CONCLUSION

For all of the foregoing reasons, the Court should deny Defendants' motion to dismiss.

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Respectfully submitted,

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